No. 14-915

In The

Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE ATTORNEY GENERAL OF CALIFORNIA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

2. Whether *Abood*'s requirement that employees not be required to fund a union's nonchargeable expenses must be administered using an opt-in, rather than opt-out, mechanism in order to avoid violating the First Amendment.

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STATEMENT

1. California's Educational Employment Relations Act was enacted in 1975 to, among other things, improve personnel management and employee relations in California public schools. Cal. Gov't Code § 3540. The Act permits a majority of public school employees to choose to be represented by a union, which then becomes the exclusive bargaining representative for all employees in negotiations with the employing school district on matters within the scope of the representation. *See id.* §§ 3543, 3543.1(a), 3543.3, 3544. That scope is "limited to matters relating to wages, hours of employment, and other terms and conditions of employment," which include "health and welfare benefits ..., leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security ..., procedures for processing grievances," layoffs of non-tenured teachers, and alternative compensation or benefits for a specified set of employees. *Id.* § 3543.2(a)(1); *see also id.* § 3543.2(b)-(e) (describing other permissible subjects of meetings and negotiations); *San Mateo City Sch. Dist. v. Pub. Emp't Relations Bd.*, 663 P.2d 523, 528-529 (Cal. 1983) (interpreting section 3543.2). The exclusive representative may not negotiate with a school district over any contract proposal that would replace, set aside, or annul a provision of the state Education Code. *Cumero v. Pub. Emp't Relations Bd.*, 778 P.2d 174, 183 (Cal. 1989).

A union selected as exclusive bargaining representative is subject to a number of obligations under the Act. For example, it must meet and negotiate in good faith with the school employer and participate

in procedures designed to break any impasse in negotiations. Cal. Gov't Code § 3543.6(c), (d). It must also "fairly represent each and every employee in the appropriate unit." *Id.* § 3544.9. That duty of fair representation means that a recognized union "'cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft.'" *Anaheim Elementary Educ. Ass'n v. Bd. of Educ.*, 225 Cal. Rptr. 468, 471 (Cal. Ct. App. 1986) (quoting *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 204 (1944)) (discussing scope of union's duty under California law). Violation of these duties may constitute an unfair practice remediable by the state Public Employment Relations Board. *See Council of Sch. Nurses v. Los Angeles Unified Sch. Dist.*, 169 Cal. Rptr. 893, 896 (Cal. Ct. App. 1981).

Public school employees are not required to join the union acting as their exclusive bargaining representative. *See* Cal. Gov't Code §§ 3543(a), 3546(a); *Cumero*, 778 P.2d at 181. For nonmembers, the Act authorizes the union to charge an "[a]gency fee," not to exceed the dues payable by members, to cover the nonmember's share of chargeable expenses. *See* Cal. Gov't Code § 3546(a). These include "the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative." *Id.*

A union may set its agency fee to include the cost of certain "nonchargeable" activities, unrelated to collective bargaining. Under the Act, however, nonmembers are entitled "to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, con-

tract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." Cal. Gov't Code § 3546(a). Each year, the union must send a written notice to all nonmembers setting forth the amount of the agency fee, the percentage of the fee attributable to chargeable expenses, the basis for that allocation, and a description of the process for declining to pay any portion of the fee attributable to nonchargeable expenses. Cal. Pub. Emp't Relations Bd. Regs. § 32992(a); *see also id.* § 32992(b)(1) (notice must also include audited financial report used to calculate chargeable and nonchargeable expenses or certification from independent auditor). Nonmembers must have at least thirty days to opt out of paying nonchargeable amounts. *Id.* § 32993(a), (b). Any collection of fees in violation of these provisions is an unfair practice. *Id.* § 32997; *see also* Cal. Gov't Code §§ 3543.5(a), 3543.6(b) (illegal for any union or school employer to coerce, discriminate against, or impose or threaten reprisals against any employee who exercises any right provided under the Act).

The Act prescribes certain procedures for public participation in the collective bargaining process. *See* Cal. Gov't Code § 3547(e) (one purpose of Act is to ensure that public is "informed of the issues that are being negotiated upon and have a full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives"). For example, all initial contract proposals by a union or a school district must be presented at a public meeting and then become matters of public record. *Id.* § 3547(a). The school district may not negotiate over any proposal until after a reasonable time has elapsed following the proposal's release to the public, so that "the public can become

informed" and express its views. *Id.* § 3547(b). After the release of initial proposals, the school district must hold a public meeting, *id.* § 3547(c), and any new subject of meeting and negotiating that arises after the initial proposals must be made public within 24 hours, *id.* § 3547(d).

Employees who are dissatisfied with their union may seek to remove their exclusive bargaining representative by submitting a petition to the state Public Employment Relations Board demonstrating that 30% of the employees in the negotiating unit (including those who are not members of the union) oppose the incumbent exclusive representative or support a different organization. Cal. Gov't Code § 3544.5(d). If the Board finds a question of representation exists based on the submitted petition and other investigation, it must convene an election conducted by secret ballot. *Id.* § 3544.7. The ballot must give employees the option to vote for "no representation." *Id.* § 3544.7(a).

2.a. Petitioners, ten public school teachers in California and the Christian Educators Association International, filed suit against a number of local teachers' unions, the unions' national and statewide affiliates, and local school superintendents. Pet. App. 41a-75a. Their first claim alleged that the Act's provision for mandatory agency fees unconstitutionally compelled them to support union activities with which they disagreed. Pet. App. 44a. Each individual petitioner alleged that he or she "objects to many of the unions' public policy positions, including positions taken in collective bargaining," but no petitioner identified any specific objectionable position. Pet. App. 47a-49a; *see also id.* 50a-51a. According to the complaint, requiring "any financial contributions in

support of any union" violated nonmembers' rights under the First Amendment. Pet. App. 73a.

Petitioners' second claim alleged that the Act violated their speech and associational rights by "requiring [them] to undergo 'opt out' procedures to avoid making financial contributions in support of 'non-chargeable' union expenditures." Pet. App. 73a. According to the complaint, each petitioner subject to an agency fee requirement had successfully exercised his or her right to opt out, some for many years. Pet. App. 46a-49a; *id.* at 49a (petitioner Cuen opted out every year since 1997). Nevertheless, petitioners contended that the requirement that nonmembers take an affirmative step to avoid paying nonchargeable expenditures imposed a substantial burden on their First Amendment rights. Pet. App. 56a, 72a.

Petitioners also filed a motion for a preliminary injunction, appending more than 1,800 pages of declarations and exhibits in support of their constitutional arguments. Mot. for Prelim. Injunction (Dist. Ct. Dkt. 71). After the district court granted the defendant unions' request for a five-week continuance to permit them to develop and present facts to counter the evidence submitted by petitioners, petitioners asked the district court to reverse itself, deny the continuance, and instead grant judgment on the pleadings—but in favor of the unions. App. for *Ex Parte* Order for Reconsideration (Dist. Ct. Dkt. 80); Pet. App. 4a, 6a. That approach, petitioners urged, would limit the district court's review to the pleadings and would moot both the unions' request to respond to the evidence submitted by petitioners and petitioners' pending motion for preliminary relief. *See* App. for *Ex Parte* Order for Reconsideration

(Dist. Ct. Dkt. 80) at 2-3; Mot. for Judgment on Pleadings (Dist. Ct. Dkt. 81) at 1-2.

In support of their unusual proposal, petitioners acknowledged that their claims were foreclosed by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which upheld the constitutionality of compulsory agency fees, and the Ninth Circuit's decision in *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992), which upheld the validity of related opt-out requirements. Pet. App. 7a. Following the filing of petitioners' motion, the Attorney General of California intervened in the action to defend the constitutionality of the state statutes challenged in petitioners' complaint. The district court granted petitioners' motion for judgment on the pleadings, holding that *Abood* and *Mitchell* required entry of judgment in favor of the defendants. Pet. App. 8a.

b. On appeal, petitioners again acknowledged that *Abood* and *Mitchell* foreclosed their claims. They urged the court of appeals to affirm the district court's entry of judgment on the pleadings "as quickly as practicable," so that petitioners could "expeditiously take their claims to the Supreme Court." Opening Br. (9th Cir. Dkt. 18-1) at 3; *see also id.* at 23.

As petitioners requested, the court of appeals summarily affirmed. Pet. App. 1a-2a. In a single sentence, the court agreed that *Abood* and *Mitchell* foreclosed petitioners' claims. Pet. App. 1a-2a. Petitioners did not ask the court of appeals to reconsider its prior ruling on the opt-out question in *Mitchell*. On the contrary, they expressly argued that it would not be "an appropriate or efficient use of judicial resources" for the court to consider that claim, which would at best provide them with only "partial relief."

Urgent Mot. to Expedite & Submit on Papers (9th Cir. Dkt. 7) at 6 n.2.

ARGUMENT

1. In *Abood*, this Court recognized that a State may require all public employees represented by an exclusive collective bargaining representative to pay their fair share of the costs incurred in providing that representation. 431 U.S. at 217-232; *see, e.g.*, CTA Opp. 8-13. Later cases have repeatedly reaffirmed that central holding. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 413-415 (2001); CTA Opp. 11-13 (discussing decisions). Most recently, *Knox v. Service Employees International Union*, 132 S. Ct. 2227 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), both declined to extend *Abood*, but neither decision disturbed its basic rule. *See* CTA Opp. 14-16.

Petitioners argue (Pet. 12-20) that collective bargaining under California's Educational Employment Relations Act necessarily involves "political" speech, and that the Act's funding provisions must therefore be subjected to the most searching level of judicial scrutiny. But negotiations addressing routine employment matters—procedures for taking leave, for example, or the condition of faculty lounges, or the method for processing employee grievances—are not "political" in that sense. *Cf., e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1216-1217 (2011) (speech addressing "the political and moral conduct of the United States and its citizens" and "the fate of our Nation"). Even if petitioners are correct that some topics of collective bargaining could be said to involve matters of public or policy interest, this case offers no sound basis for testing whether there is a constitutionally relevant line between conditions of employ-

ment and matters that are principally issues of public policy, for petitioners' complaint nowhere identifies any position that the respondent unions have actually advanced in collective bargaining and to which petitioners object on ideological grounds. On the contrary, petitioners argue that *all* public-sector bargaining is "political speech." Reply 9. That abstract contention supplies no sound basis for entertaining petitioners' request that the Court reconsider and overrule *Abood*. *See, e.g.*, *United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 856 (1996) (principle of *stare decisis* requires "'special justification'" before Court will depart from prior precedent).

2. Overruling *Abood*'s long-established rule would undermine important state interests and cause unwarranted disruption in States, such as California, that have structured and maintained their public employment systems based on this Court's precedents.

In adopting the Act, the California Legislature concluded that a system of exclusive representation based on majority rule would provide important benefits to both public school employees and their employers. *See San Mateo*, 663 P.2d at 531 (Act "furthers the public interest by promoting the improvement of personnel management and employer-employee relations within the public school systems"). For example, exclusive representation can provide an efficient mechanism for school employers to learn about employee needs, to resolve issues that could otherwise cause conflict in the workplace, and to agree on and build support for organizational priorities.

Having permissibly adopted an exclusive representation system, the State has a concomitant inter-

est in ensuring that bargaining representatives have the resources to perform their statutory duties. Mandatory agency fees ensure that all employees in a particular bargaining unit pay a fair share of the cost of the representation. They prevent the unfairness and conflict that could arise were only part of the workforce to support representation activities that, by law, must advance and protect the interests of every employee. *See Cumero*, 778 P.2d at 181 ("purpose for which [the Act] authorizes organizational security arrangements is to assure that nonmembers pay their fair share of the labor organization's costs of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" (internal quotation marks omitted)); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment and dissenting) (noting that free riders in union context are those "whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests" (emphases in original)).

Public school employees in California may choose to engage in collective bargaining with their employers. If they do, the law requires the organization they select to represent them to discharge that responsibility fairly with respect to every employee. Relying on a principle long recognized by this Court, California authorizes such an organization to spread the cost of its work among all the employees that it is required to represent. And relying on that legal framework, school districts in the State have negotiated multi-year collective bargaining agreements with the representatives selected by their employees. Nothing in petitioners' arguments makes an adequate case for disrupting these longstanding, com-

plex, and sensible statutory and contractual arrangements.

3. Even if there were some reason to revisit *Abood*, this case would not be a good vehicle for doing so. As explained in the respondent unions' brief in opposition, the record here has not been developed in a way that would allow the Court to consider the constitutional issues in any concrete or adequately tested factual context. *E.g.*, CTA Opp. 24-25.

In their reply brief, Petitioners assert (at 10) that the only fact relevant to this case is that the respondent unions require petitioners to pay an agency fee. But that assertion is belied by petitioners' own intensely fact-dependent arguments. For example, in challenging the State's interest in avoiding free riding by represented employees, petitioners assert that the duty to represent all employees does not "materially alter[] what the unions say and do" in negotiations. Pet. 22; *see also* Reply 5. In their rush, however, to present their arguments to this Court, petitioners have built no record to support that factual premise. Similarly, petitioners argue that government interests in labor peace and the avoidance of free riding are insufficient to support compulsory agency fees unless collective bargaining benefits cannot be secured without the fees—a "demanding showing" that they claim respondents cannot make. Pet. 25. Yet this factual question—what effect the existence or lack of mandatory fees has on collective bargaining and the effective discharge of unions' duty of fair representation—was never explored in the lower courts, given petitioners' insistence that the courts rule against them quickly based on settled law.[1]

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[1] Petitioners and their *amici* rely on many other factual (continued...)

The deficiencies in the record cannot be cured by looking to the allegations in petitioners' complaint. Reply 11 n.6. On a motion for judgment on the pleadings, courts must accept as true the allegations in the *non-moving* party's pleadings. *E.g.*, *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Petitioners' contrary argument cites an isolated sentence from Wright & Miller (Reply 11 n.6), but that treatise too refutes their position. *See* 5C Fed. Prac. & Proc. Civ. § 1368 (3d ed.) ("axiomatic" that in resolving Rule 12(c) motions, "all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false"). The attachments to petitioners' motion for a preliminary injunction, which petitioners repeatedly cite, likewise cannot fill the void. *See* Pet. 7, 24 (citing Pet. App. 79a, 80a-81a, 83a, 96a-97a). Documents submitted in support of such a motion are not properly before the Court in its review of a judgment on the pleadings—a point that petitioners themselves urged below. *See Land v. Dollar*, 330 U.S. 731, 734-735, 735 n.4 (1947); Mot. for

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(...continued)
assertions that lack footing in the record—let alone the benefit of adversarial testing. *See* Pet. 23 (claiming it is "doubtful" that collective bargaining by unions benefits rather than harms nonmembers); Pet. 24 (claiming that unions intentionally decline to pursue certain benefits in collective bargaining so they can offer the benefits themselves to induce teachers to join); Pet. 19 (arguing that the respondent unions pursue the same speech in collective bargaining that they do in lobbying); Reply 6 (arguing, without citation, that costs of grievance representation represent a "tiny fraction" of agency fees); Wilson Br. 6 (challenging free-rider rationale for agency fees based on claim that teachers do not benefit from positions advanced by unions in collective bargaining).

Judgment on Pleadings (Dist. Ct. Dkt. 81) at 9 (asking district court to "render [petitioners' evidence submitted in support of motion for preliminary injunction] irrelevant by entering judgment on the pleadings for [respondents]").[2]

In short, petitioners ask this Court to consider overruling a longstanding precedent on purely abstract grounds, without the benefit of any concrete factual setting—or, indeed, any factual record at all, apart from the allegations advanced by the union respondents. *Cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (facial challenges "disfavored" because "often rest on speculation" and present issues based on "factually barebones records").

4. Petitioners also ask the Court to hold that it violates the First Amendment to require an employee to opt out of paying nonchargeable expenses. Pet. i, 34-36. For reasons explained in the respondent unions' brief in opposition (at 27-30), that claim is insubstantial. No individual petitioner in this case claims that he or she has been unable to exercise the right not to support nonchargeable activities. On the contrary, each has affirmatively alleged that he or she has successfully opted out of paying for such activities, some for many years. Pet. App. 46a-49a.

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[2] The absence of a sufficient record crystallizing the issues for this Court's consideration is further confirmed by petitioners' late-in-the-day redefinition of the scope of their claims. Petitioners' complaint alleged that requiring "any" financial contribution "in support of any union" (Pet. App. 73a) violated their First Amendment rights. Their reply brief in this Court concedes (at 6) that some compulsory contributions—those assessed to support union representation in the grievance-adjustment process—pose no constitutional concern.

Without some showing of actual interference with petitioners' rights, there is no reason to question the Legislature's decision to adopt one administrative mechanism for protecting those rights rather than another.

Petitioners point to no conflict of authority on the validity of opt-out requirements. Courts have taken different positions on whether an employee may be required to renew an objection every year (Pet. 35-36; CTA Opp. 31; Reply 9), but petitioners' complaint challenged *any* opt-out requirement (Pet. App. 73a-74a). Petitioners' claim therefore does not implicate any conflict on the narrower question of annual renewal. In any event, no version of the opt-in/opt-out question warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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